

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

GEISSLER'S SUPERMARKETS

and

Case No. 34-CA-12046

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 371**

Rick Concepcion, Esq., Counsel for the General Counsel.
Fred Grubb, Esq., *Fred B. Grubb & Associates, LLC*, for the Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on November 19, 2008 ¹ in Hartford, Connecticut. The Complaint herein, which issued on August 28, and was based upon unfair labor practice charges and amended charges filed on May 13, July 22 and August 26 by United Food and Commercial Workers Union, Local 371, herein called the Union, alleges that on about April 5, Geissler's Supermarkets, herein called Respondent, refused to allow supervisor Maureen Farrelly to return to work from an indefinite suspension, and on about April 14, terminated Farrelly because the Union filed charges on her behalf in Case No. 34-CA-12017, and because she provided testimony to the Board in that case, in violation of Section 8(a)(1)(4) of the Act.

Findings of Fact

I. Jurisdiction

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Farrelly's Supervisory Status

Until April 1, Farrelly was the deli-manager at the Respondent's main store in East Windsor, Connecticut, herein called the store, and is admitted to being a supervisor within the meaning of Section 2(11) of the Act.

III. The Facts

The Respondent operates a chain of retail grocery stores. Beginning in 2007 and continuing into early 2008 there was some dissatisfaction among certain employees at the store concerning alleged disparity in the wages that they were receiving compared to the wages being received at another of the Respondent's facilities. There were approximately twenty employees employed in the deli department at the store reporting to Farrelly. The Respondent

¹ Unless indicated otherwise, all dates referred to herein relate to the year 2008.

had opened a new store in Somers and some of the Somers employees came to the store for training. After working with, and training some of these Somers employees, some of the employees in her department, as well as other employees, asked her why the new employees at Somers were earning more than experienced employees at the store. In addition, Farrelly also felt that she was being underpaid compared to deli-manager at the Somers store and she filed a charge with the EEOC about this pay issue alleging that she was being discriminated because of her sex, but the EEOC denied her allegation. Farrelly questioned some of the managers at the store about the alleged wage disparities, but found none of the responses satisfactory. As a result of the conversations between Farrelly and the employees, about twenty employees from the department and other departments at the facility asked her about unions: what does a union do and what can they offer the employees, and Farrelly wrote to the Union, which put her in touch with Brian Truini and Keri Hoehnne, an organizer for the Union. After speaking with Hoehnne, Farrelly relayed the information to the interested employees and about six employees asked her to arrange a meeting between themselves and the Union, and a meeting was held on March 26, attended by Farrelly and about four employees.

Jim Nilsson, Jr., the president and owner of the Respondent, testified that he first learned of the union activity at the store from Jim Deskus, the manager of the dairy department, who told him that Farrelly was trying to bring a union into the store. Nilsson then prepared a letter to the employees about unions and union authorization cards that was distributed to all the store employees in about early March. He also called the labor consultant representing him at the hearing, who advised Nilsson to fire Farrelly and tell her why he was doing so. He did not fire her at that time: "I wanted to give her a chance to see if I could work with the issues and see if she wanted to denounce what she was doing with the union."

Shortly after his conversation with Deskus, he approached Farrelly and asked her "if there were any issues" and whether he could work with her to solve them. She said that she was unhappy about some rates of pay and the weight scales at the deli department, which were not working properly. That was about the extent of the conversation, and he never told her that he was aware of her Union activity.

Their next conversation occurred on March 22 when Nilsson approached Farrelly and Susan Higgins, an employee in the meat department, at a picnic table on the dock outside the store. Farrelly testified that Nilsson said that he had heard rumors that people were interested in joining a union and Farrelly said, yes, she had heard that too. They then discussed why certain of the employees at the store were unhappy and Nilsson told them of employees at another grocery chain that was trying to bring a union in where the employees didn't get any raises and after voted in the union, they became dissatisfied with the union, voted the union out, and then they received their raises. Farrelly told him of the discrepancy in wages between the store and the Somers store and that new employees at Somers were being paid more than employees who had been employed at the store for years. Nilsson then said that discussion of wages among employees was a basis for being fired and, at that point, Nilsson walked away.

Higgins testified that Nilsson approached her and Farrelly at the picnic table and said that there were rumors of people wanting to start a union, and Farrelly said that she was involved in it. They discussed the pros and cons of a union and Nilsson told them the story of the grocery chain whose employees brought in a union. Nilsson asked Farrelly why she wanted a union and she told him that she trained an employee who was being paid more than she was receiving. Nilsson testified that he approached Farrelly and Higgins at the picnic table on that day and "...said to her that there was some union activities going around and all the indications pointed to her as being the ringleader" and Farrelly said yes, she was taking questions from employees and attempting to obtain answers for them. Nilsson then told them the story of the

other grocery chain, and that was the extent of the conversation that day.

Farrelly testified that on March 25 Nilsson approached her in the deli department at the store and they began discussing the Union and he said that all fingers pointed to her. She said that was fine, that people commonly pointed fingers at her. He then said that she should look at her next paycheck because he was putting a little something in it. She gestured toward the employees and said that it wasn't about her, it was about them and that policies were changing and benefits are being taken from people, and she wasn't being notified. Her next paycheck contained a one dollar hourly raise. Nilsson testified that this was a brief discussion; he told her that he had ordered scales for the department and he was trying to remedy some of the other issues she had, and that he was giving her a raise. Farrelly testified that later that day Nilsson approached her between the meat and deli departments and said that he was going out of town for a few days and that she should stay out of trouble because he wouldn't be there to protect her. She said that trouble usually found her and that was the extent of the conversation.

The next contact between them was a telephone call on April 1 from Nilsson, who was out of town, to Farrelly, who was in the store when she received the call. She testified that she picked up the phone in the deli department and asked who was calling. Nilsson identified himself and said that she was not supporting the Respondent and called her a liar. He said that he had a room full of computer hackers who had gotten into her website and he knew what she was up to.² She said that they were just doing research to learn more about the Union. He then told her to take a few days off and she said that she did not want to take time off. He repeated that she should take a few days off and she asked how many days, two days, three days? He was not specific, he just told her to take a few days off and to think about her position on the union issue. She asked if she should finish out the day or leave in ten minutes, and he told her to leave in ten minutes, which she did. She was not told to return her store uniform or store keys, and she did not do so. Nilsson testified that he called Farrelly on April 1 after learning from the store manager that there was a Union meeting and that Farrelly was leading the Union movement. He began the discussion by telling her that the Union can't promise the employees raises or better benefits; everything is subject to negotiations with management, and she said that the Union promised her more money. He testified that he could tell from her tone of voice and responses that she was not listening or paying attention to what he was saying so, "...at that point...I said she needed to take time off and think about what side that she wanted to be on...To give her one last time to recount [sic] the Union and decide if she wanted to be part of the management team at Geissler's or being a Union rep." She did not say anything at that time to indicate that she had changed her position regarding the Union. Shortly after this telephone conversation with Farrelly, Nilsson sent an e-mail to the managers at all of the Respondent's stores stating:

I just wanted to let you know that Maureen "Mo" Farrelly has decided to take a few days off to reassess whether or not she wants to be a member of the Geissler family. Please let anybody who asks know that she has NOT been fired. If you have any questions, I will be back in the office on Friday.

When Farrelly arrived at home on April 1, after speaking to Nilsson, she notified the Union representatives of what had happened and, she was asked if she wanted them to file an unfair labor practice charge on her behalf, and she said that she did. On April 3, the Union filed an unfair labor practice charge with the Board alleging that the Respondent had violated Section

² Since about November 2007, Farrelly has maintained a website on My Space talking about the Union and complaining about the disparity in wages at the store.

8(a)(1)(3) of the Act by questioning Farrelly about her Union activities and by terminating her as a result of her engaging in “protected concerted activities.” This unfair labor practice charge was withdrawn on May 15 after the region determined that Farrelly was not protected because she was a supervisor within the meaning of the Act.

April 2 was Farrelly’s regular day off and on April 3 she called the store manager and asked if she could return to work on the following day and he told her to call Nilsson on April 4. When she called him she got his voice mail and left a message asking whether she could return to work on the following day. Having received no response, she called the store manager on April 5 and he told her to call Nilsson immediately. She did so, but prior to placing the call, she arranged to tape the contents of the call. The relevant portions are as follows:

MF: What’s up? Ed asked me to call you.

JN: Oh yeah. You left a message about going to work on Sunday.

MF: That’s my next scheduled day.

JN: You said you were going to take a few days off to think about it. I believe your actions really have confirmed what you were going to do.

JN: The Union filed a complaint for you...you told them you were fired.

MF: I did not tell them I was fired.

JN: Well, that’s what it says on the complaint.

MF: I never said I was fired. I said I was told to take a couple of days off and I didn’t want to...

JN: Well, that’s what the charge says. If you want to get the charge withdrawn, we’ll talk about you coming back, but until that happens, you’re not coming back to work...You’re in deep shit now, let me tell you, because filing a charge with the Federal Labor Board against me, I’m not going to stand for that. Well then, you need to call this lady at the Federal Labor Board and tell them that ...you need to withdraw that complaint.

That was her last conversation with Nilsson and she did not request that the charge be withdrawn at that time as requested by Nilsson. The Respondent issued a Payroll Change Notice dated April 14 stating that Farrelly was discharged for “Not siding with management on issues at store.” Farrelly did not see this document until the day prior to the hearing herein. Nilsson testified that between April 1 and April 14, nothing new developed at the store relating to Farrelly, other than the filing of the unfair labor practice charge on her behalf by the Union.

IV. Analysis

Although there are some minor credibility issues herein, they need not be determined because the ultimate issue is clear and direct. Farrelly, a supervisor within the meaning of the Act, either initiated, or strongly supported, the Union movement at the store. Nilsson spoke to her about it on a number of occasions, making clear his opposition to her actions. When that didn’t work, he told her on April 1 to take a few days off from work to think about whether she was with him or with the Union. Farrelly immediately called the Union and they filed an unfair labor practice charge on her behalf. After receiving the charge, Nilsson told Farrelly that unless she withdrew the unfair labor practice charge, she could not return to work at the store. When she did not immediately withdraw the charge, she was terminated nine days later. What makes this case unusual is that because Farrelly is a supervisor within the meaning of the Act, the Respondent could have lawfully fired her for her Union activity on April 1, and the region’s determination to dismiss the initial charge illustrates that. However, the evidence herein establishes that she was not fired for her Union activities or for any work related reason. Rather, the transcript from the April 5 telephone call establishes that the gravamen of the situation was the unfair labor practice charge that had been filed, and she was fired because she would not

agree with Nilsson's April 5 demand that she have the charge withdrawn.

Section 8(a)(4) of the Act states that it shall be an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." Even though Farrelly did not personally file the unfair labor practice, she is still protected. In *NLRB v. Scrivener*, 405 U.S. 117 (1972) the Court dealt with the issue of employees who were discharged for giving written statements to a Board agent, although they had not filed charges with the Board. The Court found that the language of Section 8(a)(4) should be read broadly and that the discharges violated the Act. In *National Surface Cleaning, Inc. v. NLRB*, 54 F3d, 35 (1st Cir. 1995), the Court disagreed with the Respondent's contention that an employer cannot be found to have violated Section 8(a)(4) of the Act for taking an adverse action against an employee unless that employee has, strictly speaking, "filed charges or given testimony under the Act." The Court said that the liberal approach set forth in *Scrivener* was justified in order to encourage all persons with information about unfair labor practices to be free from coercion about reporting these actions to the Board. I therefore find that Farrelly's allegation herein is not affected by the fact that the Union filed the unfair labor practice charge on her behalf.

The principal issue herein is whether Farrelly is protected under Section 8(a)(4) even though she was a supervisor within the meaning of the Act while employed at the store. There is disagreement between the Board and the Courts on this issue, and some disagreement among Board members as well. In *General Services, Inc.*, 229 NLRB 940 (1977), enf. denied 575 F.2d 298 (5th Cir 1978), the Board found that the employer had refused to rehire the supervisor because he had filed an unfair labor practice charge with the Board. After discussing the history of the Taft-Hartley amendments to the Act in 1947, especially Section 2(11), the Board found that the employer's refusal to rehire the supervisor violated Section 8(a)(4), the Board majority stated:

We conclude that the protection afforded supervisors under Section 8(4) of the 1935 Act was not removed by the Taft-Hartley amendments of 1947, and that Section 8(a)(4) therefore provides a guarantee to a discharged supervisor who files an 8(a)(3) charge that he may obtain a Board ruling on his status free from employer discrimination because he filed a charge.

In *Hi-Craft Clothing Co.*, 251 NLRB 1310 (1980), enf. denied 660 F.2d 910 (3d Cir. 1981), the admitted supervisor, unhappy at not receiving a bonus that he believed had been promised to him, advised his manager that he was "going to the Labor Board." When he repeated his intention to go to the Board, he was fired. The Board (with member Truesdale dissenting) affirmed the administrative law judge's finding that the discharge violated Section 8(a)(4) of the Act, agreeing with the General Counsel's argument that there is a strong public policy favoring the free and unimpeded access to the Board's processes and, therefore, supervisors should also be protected when invoking, or seeking to invoke, the Board's processes. In *Beverly California Corporation*, 326 NLRB 153, 202 (1998), the Board affirmed the judge's finding that a statement made to supervisory nurses that if they dropped the charges that were filed with the Board they would be given a pay raise, violated Section 8(a)(4) of the Act. In *SNE Enterprises, Inc.*, 347 NLRB 472, 497 (2006), the Board affirmed the findings of the administrative law judge that the employer violated Section 8(a)(4) of the Act by firing a supervisor for testifying adversely to the employer's position at an objections hearing before the Board. See also *Oil City Brass Works*, 147 NLRB 627 (1964), enf. 357 F.2d 466 (5th Cir. 1966). In *Foundation for Comprehensive Health Services*, 267 NLRB 95, 133 (1983), the Complaint was dismissed because it was found that the supervisor's discharge was not motivated by his adverse testimony in a Board representation hearing.

The issue in *SNE, Foundation* and *Oil City* is not as difficult or controversial as the issue in *General Services* and *Hi-Craft* and the issue herein. When a supervisor is fired for testifying truthfully, but adversely to his employer's position at a Board hearing, that testimony has a direct effect upon the Section 7 rights of non-supervisory employees. On the other hand, the unfair labor practice charges in *General Services* and *Hi-Craft* were filed by, and affected only the supervisory employees. In the instant matter, while the unfair labor practice charge referred only to Farrelly, the underlying problem was that she was active with other employees at the store who were trying to obtain the Union as their collective bargaining representative. If she can be fired because she would not withdraw an unfair labor practice charge that was filed on her behalf, her fellow employees might be reluctant to go to the Board. Based upon the cases cited above, as well as the possible effects that the Respondent's actions had on the non-supervisory employees at the store, I find that the Respondent violated Section 8(a)(1)(4) of the Act by ordering Farrelly not to return to work on April 5, and by discharging her on April 14.

Respondent's brief has two principal defenses to the allegation herein. The initial defense is that Farrelly was acting solely on her own behalf, rather than supporting the employees at the store in their attempt to obtain answers to their concerns, and therefore her termination did not impact the rights of employees to avail themselves of the Board's processes. The other defense is that up through the April 1 telephone call, all of Nilsson's warnings to Farrelly related to her Union activities and because the evidence established that she was unwilling to cease engaging in these activities, she was *really* fired for her Union activities, rather than her unwillingness to have the unfair labor practice charge withdrawn. I disagree with both of these defenses. Although no employee witness testified for the General Counsel, I credit Farrelly's testimony that she spoke for, and on behalf of the employees at the store who discussed their unhappiness with some of the working conditions at the store. Further, the letter that Nilsson distributed to all the employees was about unions, and union authorization cards, and in his March 22 discussion with Farrelly and Higgins he spoke about rumors of "people," not simply Farrelly, trying to start a union at the store. In addition, at the Union meeting held on March 26, Farrelly attended with four other employees. Finally, I believe it is reasonable to state that a union would not go to the expense and trouble of attempting to organize a unit limited to one supervisory employee. As regards the Respondent's remaining defense, the evidence from the April 5 telephone call could not be clearer: "If you want to get the charge withdrawn, we'll talk about you coming back, but until that happens, you're not coming back to work. You're in deep shit now..." He also said that he would not stand for her filing a charge with the Board. Although he could have lawfully discharged her on that day or prior to that, he did not do so. He fired her not for her Union activity, but because she refused to have the unfair labor practice charge that was filed on her behalf withdrawn, in violation of Section 8(a)(1)(4) of the Act.

Conclusions of Law

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Respondent violated Section 8(a)(1)(4) of the Act by refusing to allow Farrelly to return to work on April 5, and by discharging her on April 14.

The Remedy

Having found that the Respondent unlawfully ordered Farrelly not to return to work on April 5 and discharged her on April 14, I recommend that the Respondent be ordered to offer her immediate reinstatement to her former position of employment or, if that position no longer

exists, to a substantially equivalent position, and to make her whole for all loss of earnings and other benefits as set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), along with interest as computed in *New Horizons for the Retarded*, 289 NLRB 1173 (1987). The Respondent shall also remove from its files all references to the unlawful actions taken against Farrelly and notify her, in writing, that it has done so.

Upon the foregoing findings of fact, conclusions of law and the entire record, I hereby issue the following recommended

Order³

The Respondent, Geissler's Supermarkets, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against a supervisor or an employee because that individual filed unfair labor practice charges with the Board, or had charges filed on her/his behalf with the Board.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights under the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order offer Farrelly full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Farrelly whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth above in the remedy section of this Decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Farrelly, in writing, that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at each of its stores in Connecticut

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and Massachusetts, copies of the attached notice marked “Appendix.”⁴ Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 5, 2008.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. , January 2, 2009.

Joel P. Biblowitz
Administrative Law Judge

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge, or otherwise discriminate against supervisors or employees because they filed charges with the National Labor Relations Board or had charges filed on their behalf with the Board and **WE WILL NOT** in any like or related manner interfere with, restrain or coerce you in the exercise of your rights guaranteed by Section 7 of the Act.

WE WILL offer Maureen Farrelly immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and **WE WILL** make her whole for any loss of earnings that she suffered as a result of her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Farrelly, and **WE WILL**, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

GEISSLER'S SUPERMARKETS
(Employer)

Dated _____ By _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

280 Trumbull Street, 21st Floor
Hartford, Connecticut 06103-3503
Hours: 8:30 a.m. to 5 p.m.
860-240-3522.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 860-240-3528.